Filed 5/9/19 In re D.D. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re D.D., A Person Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARIA S., Defendant and Appellant.	B292310 Los Angeles County Super. Ct. No. 18CCJP04024A

APPEAL from orders of the Superior Court of Los Angeles County. Kim L. Nguyen, Judge. Reversed and remanded.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Maria S. (mother) appeals from the juvenile court's jurisdictional and dispositional orders. She challenges the court's termination of its jurisdiction over her daughter D.D. and entry of a juvenile custody order placing D.D. in her father's sole physical custody with monitored visitation for mother. Because the trial court did not expressly find D.D.'s removal was required by clear and convincing evidence under section 361, subdivision (c) of the Welfare and Institutions Code,[1] we reverse and remand for a new disposition hearing.

BACKGROUND

1. *The incident triggering the dependency petition*

Seven-year-old D.D. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) when sheriff's deputies responded to several reports of domestic violence between mother and her boyfriend, Edgar, early in the morning of June 24, 2018. A deputy at the scene observed blood dripping down the side of Edgar's face, several bumps on mother's forehead, and blood on the trunk and inside the couple's car. D.D. told the deputy and a social worker that she saw her mother and Edgar push each other. The deputies arrested the couple and took D.D. into protective custody.

On the night of the incident, D.D. had been at a restaurant with mother and Edgar until about 1:30 a.m., where mother and Edgar drank beer. They then all went to Edgar's brother's house where mother and Edgar drank more beer. The altercation began around 2:45 a.m. when a roommate blocked their car in the

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[1] Statutory references are to the Welfare and Institutions Code unless noted otherwise.

driveway with his truck. Edgar and the roommate started to argue outside. The brother called the police. Mother went outside during the argument.

Mother's and Edgar's accounts of what happened next differ. Edgar said he told mother not to get involved and that she "head-butted" him, cutting him above the eye. He was so angry he punched the car. He reported having drunk three beers. He also said this was the first time an incident like this had happened. He and mother do not live together. Mother, on the other hand, said she did not "head-butt" Edgar and did not know how the bumps got on her head. She said she was aware of what was going on and not intoxicated. She reported she never had been arrested and had no history of drug use or domestic violence.

D.D. ultimately was detained with her father. At the time, D.D. was in second grade and lived with her mother, maternal grandparents, and maternal aunt. Father lives with his girlfriend/wife[2] and her two teen-aged daughters. He confirmed D.D. typically visited him overnight twice a month. There were no visitation orders in place, and mother controlled the visits. He reported mother had some "anger issues," but denied any domestic violence. He told a social worker he wanted to care for his daughter. After conducting a home assessment, the social worker detained D.D. in father's care.

DCFS assessed D.D. as "high" risk of future abuse due to mother and Edgar having "consumed alcohol all night" followed

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[2] The June 27, 2018 detention report refers to the woman father lives with as his "girlfriend," while the August 21, 2018 jurisdiction/disposition report refers to her as his "wife."

by the physical altercation that D.D. witnessed. It filed a petition on June 26, 2018, alleging under section 300, subdivisions (a) and (b)(1) that mother and Edgar had engaged in a "violent altercation" and had pushed each other in D.D.'s presence, endangering D.D. and placing her at risk of serious harm.

At the June 27, 2018 detention hearing, the juvenile court ordered D.D. released to the home of father under DCFS supervision with monitored visitation for mother. The court ordered mother to test clean for drugs and alcohol, to receive liberalized visits at DCFS discretion and ordered no contact between D.D. and Edgar.

2. *The jurisdiction/disposition report*

In its August 21, 2018 jurisdiction/disposition report, DCFS reported on its interviews with the parties about the petition's allegations.

D.D. was interviewed at father's home. When asked why she lived with father, D.D. said, " 'My mom made a mistake and was fighting with her boyfriend Edgar.' " D.D. witnessed the incident, reporting, "my mom fell four times on the floor, she threw the keys at [Edgar]. . . . I was crying because I didn't want her [mother] to go to jail. There was a guy . . . hitting [Edgar], I was screaming and crying. The guy was defending my mom from Edgar. . . . I was scared, he carried Edgar and hit him [against] the car."

When asked if she had ever seen mother and Edgar argue or fight before, D.D. said, " 'sometimes on the phone.' " She reported she liked Edgar, but "if she had a magic wand" her family would " 'behave good' " and there would be " 'no drinking for Edgar.' " She told the social worker her mom " 'only drinks

one (beer) a day.' " When asked, D.D. reported she wanted to tell the judge, " 'I want to go back with my mom.' "

A social worker separately met with mother at her home to ask her about the incident. Mother reported she had been dating Edgar for about five months. She believed alcohol affected her and Edgar's decision making at that early morning incident, and "she wish[ed] she would have went [*sic*] home after the restaurant." She said D.D. had been asleep at both the restaurant and Edgar's brother's house, but the loud music woke her up. In addition to what she previously reported, she added that when she went outside to join Edgar to ask the roommate to move his truck, Edgar told her to go inside, grabbed her arm, and pushed her. She fell, breaking the heel of her shoe, and went back inside the house.

She denied knowing how Edgar received the cut above his eye, but said he had broken the tail light of her car and punched either her car or the wall. Mother denied she had "knots on her forehead." She "reported she was at the wrong place at the wrong time."

Mother told the social worker she would not "be OK" until she got D.D. back and had "never been apart from her daughter." She said she did not agree with "a 50/50 custody agreement because father . . . has never helped her care for [D.D.]" Yet, mother also reported father gave her $250 per month for D.D., which increased to $450 per month about a year and one-half earlier.

A social worker interviewed Edgar over the phone. He described the incident and reported he told mother to go inside and " 'grabbed her hand.' " He denied that he and mother hit each other. He denied that either of them had an alcohol problem

and denied any domestic violence in his relationship with mother. He "reported he no longer drinks alcohol and . . . is taking domestic violence classes."

Father also was interviewed. He had no firsthand knowledge of the incident. He did not know Edgar. Father reported D.D. "is protective of her mother." He said "at times he observes inappropriate behaviors that suggests [D.D.] lacks structure at home and it worries him." He believes mother has underlying mental health issues.

Before DCFS became involved, he would see D.D. about "every other weekend and at times during the week." He also sometimes took his daughter on family vacations. He told the social worker he would like D.D. to remain in his care, but would like to obtain a 50/50 custody arrangement, "as he is not trying to keep her from her mother." D.D. reported she did not want to live with father because he and his girlfriend sometimes get " 'a little mad' " at her when she does not listen. D.D. denied anyone hit her.

Concerning its recommended disposition, DCFS reported mother had been "cooperative throughout the investigation," appeared "motivated to reunify with her daughter[,] . . . and is currently enrolled in [d]omestic [v]iolence classes." Mother believed "she could benefit from individual counseling and domestic violence counseling." Mother also was participating in random drug testing.

DCFS also reported D.D. said she wanted to live with mother because " 'she is special to me and I love her a lot.' " DCFS attached D.D.'s grades to its report. D.D. was doing well in school while living with mother. She received a high

achievement certificate in math in March 2018 and an honor roll certificate the year before.

As to D.D.'s safety, DCFS concluded D.D. needed to remain detained from mother. Mother had admitted to drinking the night of the incident and "law enforcement reported [she] appeared to be under the influence." DCFS noted mother therefore "supervised her daughter . . . while under the influence of alcohol and admitted that alcohol played a factor in her decision[-]making process that night." DCFS found mother's and Edgar's "aggressive conduct" in D.D.'s presence "endangered her physical and emotional wellbeing as such that [D.D.] is at risk of suffering further emotional or physical harm in the care of . . . mother." DCFS reported,

> "It appears mother . . . and [Edgar] are denying and minimizing the physical altercation that took place between them on 06/24/18. This is concerning because the underlying issues are likely to remain unresolved if they are not addressed and remedied. . . . It is evident that [D.D.] is attached to her mother and loves her mother which indicates [mother] was able to create a genuine bond with her daughter. However, [mother] could benefit from developing healthy coping skills to avoid abusing alcohol which can lead to more unpredictable and dangerous situation[s] for [D.D.] [Mother] could also benefit from considering the people she is exposing her daughter to and be mindful if they are consuming alcohol or drugs while around her

> daughter . . . and protect [D.D.] from any risky behavior/environment. Nevertheless, it is apparent [mother] and [Edgar] placed [D.D.'s] physical and emotional safety in jeopardy by exposing her to a violent and detrimental environment with domestic violence."

Mother had been having monitored visits with D.D. three days a week as earlier ordered by the court. She reported she wanted to speak to D.D. daily by phone, but father made it difficult to do so. Father reported he did not agree with mother having daily phone contact with D.D. because he was not always available to monitor the calls.

DCFS concluded mother's "poor choices, alcohol abuse, lack of conflict resolution skills and lack of parenting skills interfered with her ability to provide care for her daughter . . . and ultimately placed [D.D.] in danger and at risk of future abuse and neglect. Therefore, DCFS and Court supervision is necessary in order to ensure the child['s] . . . safety and well-being."

DCFS recommended that mother have continued monitored visits with D.D., with DCFS to have discretion to liberalize the visitation, and that she receive reunification services.

3. *Jurisdiction/detention hearing*

The court held a joint jurisdiction and disposition hearing on August 21, 2018. The court admitted into evidence DCFS's detention, addendum, and jurisdiction/disposition reports for purposes of jurisdiction and disposition. Mother testified about the June 24 incident at the hearing. She testified that when Edgar, whom she described as her fiancé, began arguing with the roommate about moving his truck, she went outside and argued with the roommate as well. Edgar then "grabbed" her and told

her to go inside. She testified, "[W]hen he grabbed me and kind of pushed me to the side, my heel on my shoe broke and I fell. I fell one time, and then I got up and went inside the house." Mother further testified that she did not know why her daughter said she fell four times and denied that Edgar "punched" her or that she "punch[ed]" him. She also denied having sustained any injuries and asserted the police report stating she did was "incorrect." She testified she was enrolled in domestic violence classes, individual counseling, and alcohol and drug classes. She remained in a relationship with Edgar, who was enrolled in domestic violence classes.

After hearing argument from counsel, the court sustained the petition under section 300, subdivision (b)(1) (child at substantial risk of serious physical harm) and dismissed the allegations under subdivision (a). The court did not find mother's testimony credible. The court described the police report's statement that when law enforcement saw mother "her clothing was disheveled, she was stumbling, [and] her forehead was swollen." Edgar "was also disheveled, stumbling, and had blood on the left side of his face." The court also noted a neighbor reported she heard a woman scream, " 'Stop! Don't do that!' " The witness then opened her door and saw mother and Edgar "punching each other in the face multiple times and pushing each other." The neighbor's statement was corroborated "by the nature of the injuries sustained by both" mother and Edgar. The court found the police report "detailed" and that "[t]here would be no reason . . . [to] infer . . . the witness would completely lie and make up this entire episode." The court also noted the blood spatter on the car hood.

The court observed D.D. "did state when she witnessed this altercation, she was very frightened, was crying, and was worried that mother would go to jail. Clearly this [was] traumatic for the child." The court found "mother lacks the insight at this juncture to appropriately protect the child from violence in the home, and there is a current risk of harm."

The court then heard argument as to disposition. Father's attorney requested the court close the case with a family law order granting father sole physical custody and joint legal custody with mother. Mother "strenuously object[ed]." Her counsel requested the court keep the case open with services in place to allow mother to reunify with D.D. Mother's counsel believed it was "a bit extreme at this juncture to assume that mother cannot take away any lessons from these services, given how early it is in the case."

The child's counsel stated D.D. "would very much like the chance to reunify with her mother. She does miss her mother and want[s] to live with her again." Counsel submitted the matter to the court, however, "see[ing] no safety risk with closing the case with father having sole physical custody."

DCFS's counsel also submitted the matter to the court. It noted the jurisdiction report recommended the court allow reunification services, but recognized mother would be entitled only to enhancement services with D.D. released to father. Based on mother's "testimony . . . and her minimization and even denial of what has occurred and the seriousness of what has occurred," counsel was not sure of the "likelihood" that mother would be able to reunify with D.D. by the next review period even if enhancement services were offered. DCFS had "absolutely no safety concerns with [D.D.] remaining with the father."

Relying on section 361.2, subdivision (b)(1), which gives the court discretion to terminate jurisdiction over a child placed with a noncustodial parent, the court terminated its jurisdiction over D.D. given she was not at any risk in father's care and custody. The court closed the case with a juvenile custody order granting joint legal custody to parents with full physical custody to father and monitored visits for mother three times a week. The court ordered D.D. to have no contact with Edgar. The court also ordered that the juvenile custody order "provide all the services necessary for mother to change this custodial arrangement in family court," such as "parenting, individual counseling, and anger management."

The court noted mother's "strenuous objection." The court stated, "based on all the evidence before the court, I think there is a lack of insight and the denial of what has taken place, and the court would exercise its discretion, again, given that the child is safe with her father to close the case."

4. *Mother's appeal*

The juvenile custody order and final judgment terminating dependency jurisdiction was filed August 23, 2018. Mother timely appealed from the court's August 21, 2018 jurisdictional and dispositional orders.[3] In her briefs, however, she challenges only the juvenile court's termination of its jurisdiction over D.D. with a custody order giving father sole physical custody. We thus

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[3] DCFS filed a letter brief stating it took no position on appeal, as it would not be "aggrieved" if mother prevailed given its original position to keep the case open "to help mother reunify" with D.D. Father and D.D. are not parties to this appeal.

do not consider whether the court erred in finding D.D. subject to dependency jurisdiction.

On March 12, 2019, under Government Code section 68081, we asked the parties to provide supplemental briefing on whether the juvenile court prejudicially erred when it failed explicitly to find by clear and convincing evidence the existence of one of the circumstances listed in section 361, subdivision (c)(1) through (5) before removing D.D. from mother's custody at disposition. Mother filed a response on March 13, 2019, and DCFS on March 29, 2019. We deemed the matter submitted on March 29, 2019.

DISCUSSION

Mother contends the juvenile court abused its discretion by prematurely terminating its jurisdiction over D.D.—and the attendant services for mother to reunify with her daughter—and awarding father sole physical custody with monitored visitation for mother. Mother argues the juvenile court erred by failing to consider D.D.'s best interests. In response to our inquiry, mother argues the court's failure to make an express finding by clear and convincing evidence that D.D. was at substantial risk of harm if returned to mother constitutes reversible error. Because we reverse on this ground, we need not consider mother's original contention.

1. *Standard of review and applicable law*

We review a dispositional order removing a child from a parent for substantial evidence. (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.) We review a juvenile court's decision to terminate jurisdiction and the terms of its juvenile custody order for abuse of discretion. (*In re Destiny D.* (2017) 15 Cal.App.5th 197, 208 [court has discretion to terminate its jurisdiction at the

end of a disposition hearing]; *In re Maya L.* (2014) 232 Cal.App.4th 81, 102 ["court has 'broad discretion to make custody orders' "].) " 'When applying the deferential abuse of discretion standard, "the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." ' " (*In re Maya L.,* at p. 102.)

Section 361.2 provides that "[w]hen a court orders removal of a child pursuant to Section 361," the court "shall place" the child with a noncustodial parent "who desires to assume custody of the child . . . unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) When the court places the child with a previous noncustodial parent, it may "[o]rder that the parent become legal and physical custodian of the child" and "shall then terminate its jurisdiction over the child. The custody order shall continue unless modified by a subsequent order of the superior court." (§ 361.2, subd. (b)(1).) (See also Cal. Rules of Court, rule 5.695(a)(7)(A) [at disposition hearing court may "[d]eclare dependency, remove physical custody from the parent . . . and [¶] [a]fter stating on the record or in writing the factual basis for the order, order custody to a noncustodial parent, terminate jurisdiction, and direct" a juvenile custody order be filed].)

Relevant here, section 361 provides that a juvenile court cannot order a dependent child removed "from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence" that "[t]here is or would be substantial danger to the physical health, safety, protection, or

physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from minor's parent's . . . physical custody." (§ 361, subd. (c)(1); see also Cal. Rules of Court, rule 5.695(c)(1) ["The court may not order a dependent removed from the physical custody of a parent or guardian with whom the child resided at the time the petition was filed, unless the court makes one or more of the findings in section 361(c) by clear and convincing evidence."].)

Before the court removes a dependent child and places the child with a noncustodial parent, therefore, the court first must find the circumstances permitting the child's removal under section 361, subdivision (c) exist by clear and convincing evidence. The initial jurisdictional finding, however, need only be made under the preponderance of the evidence standard. (§ 355, subd. (a).) Thus, " 'the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home.' " (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528 (*Henry V.*).)

2. *We cannot find the juvenile court impliedly found D.D. was at substantial risk of harm by clear and convincing evidence*[4]

Here, the juvenile court held a joint jurisdiction and disposition hearing. It found D.D. was a person described by section 300, subdivision (b). The court explained,

> "Now, just to make clear, I believe there's a current risk of harm. Simply because this was one incident and there was not a prior history, demonstrates to the court that there is volatility in this relationship, that mother is minimizing the severity of this. I'll note that [D.D.] did state when she witnessed this altercation, she was very frightened, was

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[4] DCFS contends mother forfeited review of the issue of removal by not raising it below and on appeal. We note mother objected to the jurisdictional findings below. Although she did not argue the court applied the wrong standard of proof, during the jurisdictional phase she did argue there was insufficient evidence of a risk of domestic violence. She also argued she wanted to reunify with D.D. Nevertheless, because the juvenile court's failure to find clear and convincing evidence of detriment to D.D. before removing her from mother's custody raises due process concerns, we exercise our discretion to consider the issue regardless of whether mother forfeited the issue below. (*People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6 [appellate court has discretion to "reach[ ] a question that has not been preserved for review by a party"]; *In re D.H.* (2017) 14 Cal.App.5th 719, 728; *In re Frank R.* (2011) 192 Cal.App.4th 532, 539 [expressing "reluctan[ce] to enforce the waiver rule when it conflicts with due process"].)

> crying, and was worried that mother would go to jail. Clearly this is traumatic for the child. And the court does find mother lacks the insight at this juncture to appropriately protect the child from violence in the home, and there is a current risk of harm."

Thus, the court made a detriment finding, but did so in the context of sustaining the dependency petition, which requires proof by a preponderance of the evidence. The court never stated it had found clear and convincing evidence that there "would be a substantial danger" to D.D.'s physical health or safety if she were returned to mother's home. Nor did the court state there were no reasonable means to protect D.D. without removing her from mother's custody. (§ 361, subd. (c)(1).)

DCFS contends the clear and convincing removal finding required by section 361, subdivision (c) is implied because the juvenile court proceeded under section 361.2, which is not triggered unless the child first is removed from the previous custodial parent. DCFS points to the juvenile court's express finding of " 'a current risk of harm' " after it sustained the petition under section 300, subdivision (b)(1). It asserts no party argued about removal after the court made this finding, "likely because when the court made its custody determination under section 361.2, the removal findings were inferred from the court's conclusory remarks regarding jurisdiction."

"When a court orders removal [under] [s]ection 361," it must determine if it can place the child with a noncustodial parent desiring custody. (§ 361.2, subd. (a).) By the express terms of the statute, therefore, the court *first* must order removal of the child under section 361 *before* it places the child with a

former noncustodial parent. "[S]ection 361.2 is not a removal statute." (*In re V.F.* (2007) 157 Cal.App.4th 962, 969, superseded on other grounds as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57-58 & fn. 8.) Nothing in the record shows the juvenile court made a separate removal finding under section 361, subdivision (c), however. Rather, after sustaining dependency jurisdiction over D.D., the court proceeded directly to father's request that the court close the case and award him custody under section 361.2, subdivision (b)(1). After hearing argument, the court ordered jurisdiction terminated with an order granting father full physical custody of D.D. with monitored visits by mother.

True, at the time of the hearing the court already had detained D.D. and placed her in father's care. But, the court based its initial detention of D.D. from mother on its prima facie finding, which the court described as "just a little bit of evidence," that a substantial risk of harm to D.D.'s physical and emotional well-being existed. In contrast, "[d]ue process requires the findings underlying the initial *removal* order to be based on *clear and convincing evidence*." (*Henry V., supra*, 119 Cal.App.4th at p. 530, italics added.) Indeed, "[a] dispositional order removing a child from a parent's custody is 'a critical firebreak in California's juvenile dependency system.' " (*Ibid.*)

We recognize courts will affirm implied findings if the record contains substantial evidence to support them, as DCFS notes. (See *In re Jerry M.* (1997) 59 Cal.App.4th 289, 297-298 [affirming implied finding juvenile understood wrongfulness of his conduct where finding supported by substantial evidence].) Also, generally, a reviewing court may presume the trial court applied the appropriate standard of proof. (*In re Bernadette C.*

(1982) 127 Cal.App.3d 618, 625 (*Bernadette C.*) [where applicable standard of proof is new or unclear, articulation is required, but where it is " 'well settled, it is presumed that the trial judge applied the appropriate standard and no articulation is required' "].)

Here, however, as the court said in *Henry V.*, "where the jurisdictional and dispositional phases were combined in a single hearing, we cannot be confident the lower standard of proof governing the jurisdictional findings was not transferred to the dispositional findings." (*Henry V., supra*, 119 Cal.App.4th at p. 530.) That observation is especially true here where the court not only did not make an explicit finding that D.D. was at substantial risk of harm if returned to mother based on clear and convincing evidence, but also did not make a formal removal finding at all before terminating its jurisdiction and awarding custody of D.D. to father under section 361.2.

Moreover, the only standard of proof mentioned at the hearing was the preponderance of the evidence standard. Before hearing counsel's arguments on jurisdiction, the court announced, "[DCFS] does bear the burden today to demonstrate the truth of [the petition's] allegation by a preponderance of the evidence." The child's counsel specifically said DCFS had met its burden by "a preponderance of the evidence" that the petition's allegations under section 300, subdivision (b)(1) were true. Mother's counsel argued the petition should be dismissed for "insufficiency of the evidence" and DCFS had "not met its burden to show that there's an ongoing risk of domestic violence." Finally, counsel for DCFS argued it had "met its burden by preponderance of the evidence" for the court to sustain the dependency petition. After hearing counsel's arguments, the

court sustained the petition under section 300, subdivision (b)(1), finding there was a current risk of harm to D.D. based on mother's "lack[ ] [of] insight at this juncture to appropriately protect the child from violence in the home."

In contrast, at the disposition phase of the hearing, the standard of proof never was mentioned. Rather, the court heard argument from all counsel on father's request for termination of jurisdiction and a custody order under section 361.2, subdivision (b)(1). After hearing argument, without first making a removal finding, the court ruled, "361.2 (b)(1) does provide that when a child is with a non-offending parent, that the court can terminate its jurisdiction over this child. And here in this case [D.D.] is with her father. There are no safety concerns. He has not thwarted any visitation by the mother, and the court will exercise its discretion based on the fact that [D.D.] is not . . . at any risk being in [father's] care and custody, that the court will close the case and order that [father] have full physical custody, joint legal custody between mother and father."

From this record, it is unclear what standard of proof the court applied during the disposition phase of the proceedings. We agree with the court's conclusion in *Bernadette C., supra*, 127 Cal.App.3d at page 625 that "[i]t is more reasonable to assume the court, in the absence of record evidence to the contrary, continued to apply the lesser evidentiary standard in determining to remove the child from . . . mother's custody." On this record, we can infer only that the court made its finding based on the preponderance of the evidence. Accordingly, the court abused its discretion when it did not find D.D. was at substantial risk of harm in mother's custody by clear and convincing evidence before removing D.D. from mother's custody

and placing her with father under section 361.2, subdivision (b)(1).

3. *The juvenile court's error was prejudicial*

Despite finding the court erred, "[w]e cannot reverse the court's judgment unless its error was prejudicial." (*In re Abram L.* (2013) 219 Cal.App.4th 452, 463 (*Abram L.*).) "Previous cases involving the erroneous application of the preponderance of the evidence standard rather than the clear and convincing evidence standard have not found structural error requiring automatic reversal. Instead, the reported cases have analyzed the error under the *Watson*[5] standard and required a showing it was reasonably probable the appellant would have achieved a more favorable result under the proper standard of proof." (*Conservatorship of Maria B.* (2013) 218 Cal.App.4th 514, 535.) " ' "[P]robability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

Here, there was a "reasonable chance" that had the juvenile court applied the heightened clear and convincing evidence standard, it may have determined the danger it found D.D. faced to support dependency jurisdiction did not rise to the level required to remove D.D. from mother's custody. We do not condone mother's conduct as found by the juvenile court. The incident was serious enough to support the court's jurisdictional finding that mother had placed D.D. at risk of serious harm. Evidence mitigating against finding clear and convincing evidence of a "substantial danger" to D.D. also existed.

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5 *People v. Watson* (1956) 46 Cal.2d 818.

Before the incident, D.D. primarily had lived with mother, had been doing well in school, and was on target developmentally. Mother did not have a criminal or dependency court history, and DCFS presented no evidence of any past domestic violence incidents. Moreover, the court did not expressly consider whether any conditions reasonably could be put in place to ensure D.D.'s safety in mother's home, as required by section 361, subdivisions (c)(1) and (e)).[6] Based on this record we cannot say there was no reasonable chance that mother would have obtained a more favorable outcome.

" 'A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood.' " (*Abram L.*, 219 Cal.App.4th at pp. 461, 464 [finding a reasonable probability juvenile court would not have found placing child in custody of noncustodial parent detrimental if court had applied standard under section 361.2].) Due process requires the juvenile court to hold a new disposition hearing and issue a new disposition order based on current facts existing at the time of the further proceedings. We express no opinion on the outcome of the juvenile court's determination, except to state that if it concludes removal is necessary, it must make a finding that the evidence supporting removal was clear and convincing. (See, e.g., *In re J.S.* (2014) 228 Cal.App.4th 1483, 1493 [" ' " 'The sufficiency of evidence to establish a given fact, where the law requires proof

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[6] The court considered the issue at the detention hearing, but did not expressly consider it at the joint jurisdiction and disposition hearing; nor does its minute order reflect reasonable efforts were made to keep D.D. in mother's custody.

of the fact to be clear and convincing, is primarily a question for the trial court to determine.' " ' "].)

DISPOSITION

The juvenile court's disposition order is reversed, and the case is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.